

GAHC010146302017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A. 401/2017

1:MD. GULZAR HUSSAIN,
S/O SIRAJ ALI, R/O HOUSE NO. 36, HEM BORUAH PATH, N.S. ROAD,
GHANDHIBASTI, GUWAHATI, P.O. SILPUKHURI, P.S. CHANDMARI, DIST.
KAMRUP M, ASSAM, PIN 781003

VERSUS

1:THE STATE OF ASSAM and ANR,

2:DR. BHABENDRA ALUKDAR
R/O HOUSE NO.5
MANDIR PATH JAYANAGAR
BELTOLA
GUWAHATI
P.O. BELTOLA
P.S. DISPUR
DIST. KAMRUP M
ASSAM
PIN 78102

Advocate for the appellant/complainant: Mr. B. Nath.

Advocate for the State/respondent: Ms. A. Begum, Addl. P.P., Assam.

Advocate for the respondent No.2: x

BEFORE

HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Date of hearing & judgment : 30.04.2019.

JUDGEMENT AND ORDER (ORAL)

Heard Mr. B. Nath, learned counsel appearing for and on behalf of the appellant/ complainant

as well as Ms. A. Begum, learned Addl. P.P., Assam, representing the State/respondent. None is present for and on behalf of the respondent No.2.

2. The present appellant as complainant filed a complaint case before the learned CJM, Kamrup (Metro) at Guwahati against the respondent No.2/accused, u/s.138 of the Negotiable Instrument Act, 1881 (In short 'the N.I. Act') alleging that the accused person issued three cheques in favour of the complainant which were dishonoured due to insufficient funds. The complainant alleged that the accused person approached the complainant for monetary assistance to the extent of Rs.1,32,000/- and promised to repay the same within three months and/or demand or whenever he needed and on such request the complainant paid Rs.1,32,000/- to the accused person on 13.04.2015 and no document was executed in respect of lending of such amount as the accused was known to him since long. On demand made by the complainant, for return of money, three cheques for Rs.44,000/- each were issued by the accused on 25.06.2015, 25.07.2015 and 25.08.2015 respectively, in favour of the complainant, to be drawn in the State Bank of India, Khanapara Branch and requested the complainant to deposit the cheques for collection after 26.08.2015. Accordingly the complainant deposited the cheques for encashment on 04.09.2015 in the Co-operative City Bank Ltd., Ganeshguri Branch but the cheques were returned back with the remark "funds insufficient" along with dishonour memo dated 07.09.2015. Then the complainant sent one demand notice dated 14.09.2015 to the accused stating about dishonour of cheques and demanded repayment of the borrowed money with 15 days from the date of receipt of the notice. But as the accused person failed to make repayment within the stipulated time, the complainant lodged the complaint case u/s.138 of the N.I. Act, as stated above.

3. Resultantly the C.R. Case No.2540/2015 was registered and transferred to the Court of learned Judicial Magistrate, 1st Class, Kamrup (M) at Guwahati for disposal. Accordingly process was served upon the accused/respondent No.2. On his appearance, the learned trial Court explained the offence u/s 138 NI Act to him, to which the accused person pleaded not guilty and claimed to be tried and

accordingly the case proceeded for hearing.

4. During the trial, the complainant/appellant examined two witnesses including himself in support of his case and exhibited some documents and the witnesses were subjected to cross-examination by the accused/respondent No.2. The accused did not adduce any evidence in his defence.

5. The statement of the accused was recorded u/s.313 CrPC and after hearing the parties, the learned trial Court take up following four points for decision:

1) Whether the accused issued the cheques for the discharge of any legally enforceable debt or liability towards the complainant?

2) Whether the cheques were dishonoured for insufficient funds in the account of the accused?

3) Whether the accused received the demand notice issued by the complainant regarding the dishonour of the cheque?

4) Whether the accused has committed the offence under section 138 of the Negotiable Instrument Act, 1881?

6. The learned trial Court decided the point No.1 against the accused and arrived at the conclusion that the cheques were issued for discharge of legally enforceable debt of liability towards the complainant. The point No.2 also decided against the accused and held that the cheques were dishonoured due to insufficient funds in the account of the accused. The point No.3 was decided against the accused and held that the accused received the demand notice issued by the complainant and finally the point No.4, which was crucial, decided in favour of the accused and held that the accused committed no offence u/s.138 of the N.I. Act. Resultantly the accused person was acquitted from the offence punishable u/s.138 of the N.I. Act and set him at liberty by the impugned order dated 21.11.2016.

7. Being aggrieved by the aforesaid acquittal order of the accused/respondent No.2 by the learned

trial Court, the complainant/appellant has preferred the present appeal on the grounds inter alia that the impugned judgment and order dated 21.11.2016 is bad in law and facts, that the learned trial Court did not apply its proper judicious mind and failed to appreciate the evidence on record and thereby came to an erroneous conclusion, that the learned trial Court passed the order in a mechanical manner with total non-application of mind and thereby acquitted the respondent No.2/accused, etc. and prayed for setting aside the trial Court's judgment and order dated 21.11.2016 and upon hearing the parties and after perusal of the records, to pass an appropriate order, in the interest of justice.

8. I have heard the learned counsel for the appellant Mr. B. Nath as well as Ms. A. Begum, learned Addl. P.P., Assam representing the respondent. I have also gone through the evidence on record and the perused the documents exhibited by the complainant/appellant in support of his case. Be it mentioned here that the respondent No.2 (the accused person) did not turn up despite service of notice and the case proceeded accordingly.

9. I have carefully examined the evidence on record both oral and documentary and gone through the LCR.

10. The complainant as PW-1 has examined himself and has given evidence that the accused person being well acquainted with him since earlier, approached to him and requested for financial assistance to the extent of Rs.1,32,000/-(Rupees one lakh thirty two thousand) with a promise to return the same within three months and/or demand by the complainant. Against such request he lent Rs.1,32,000/- (Rupees one lakh thirty two thousand) only to the accused person on 13.04.2015 in presence of one of his friend. Subsequently on 25.06.2015 on his demand, the accused issued three numbers of cheques (Ext-1 to Ext-3) towards repayment of the loan borrowed from him vide cheque No.822563 dated 25.06.2015 of Rs.44,000/-, No.822564 dated 25.07.2015 for Rs.44,000/- and No.822565 dated 25.08.2015 for Rs.44,000/- drawn on SBI, Khanapara Branch. The aforesaid

cheques were handed over to him, by accused after signing before him. While depositing the cheques for collection on 04.09.2015 the same returned dishonored with the remark of the bank "fund insufficient" vide Ext-5 is the cheque return memo. Thereafter, on 14.09.2015 he sent a legal notice to the accused through his advocate demanding the amount under the cheque vide ext-6 is the demand notice, Ext-6 is the postal receipt and Ext-8 is its consignment of delivery letter. Despite service of legal notice as the accused failed to repay the amount, a complaint case was filed under Section 138 of the NI Act.

11. In the cross-examination, he has stated that no promissory note was executed at the time of delivery of money. Further it is stated the amount in the cheque was written by the accused himself with his signature and other portion was filled up by the PW-1 himself. It is to be noted no any challenge was made regarding issuance of cheque by the accused/respondent and his signature thereof. On the query as to the service of demand notice he has stated that the same can be stated by his counsel.

12. His other witness, PW-2 has testified about the fact that the accused/respondent took loan from the PW-1/his friend in the month of April, 2015. And after few months when the complainant asked for return of money then the accused issued him cheques and the said cheque was bounced which he came to know from the PW-1. He has reaffirmed the fact in cross-examination that in his presence money was paid but there is no documentary evidence to this effect. He also stated that the cheque was deposited on 04.09.2015 and it was bounced on 05.09.2015. Further he stated that on the day when the loan was given, the accused issued the cheques. A suggestion was given to the PW-2 that in fact the complainant took money from him to give loan to the accused, to which he denied.

13. It is discernable that the accused/respondent has not anyway denied the taking of loan from the complainant, issuance of cheque by him and about service of legal notice demanding the money, nor the bank documents regarding bouncing of cheque. In absence of any such challenge to the case

of the complainant non-examination of bank officials appears to be not fatal.

14. From the impugned judgment it appears that the learned trial court although has discussed all the relevant issues and answered all the relevant points in favour of the complainant, that the cheques were issued for legally enforceable debt towards the complainant, that the cheques were dishonoured for insufficient fund, that the demand notice was served upon the accused/respondent but only on the basis of the evidence of the PW-2 that the cheque was issued on the same very day of taking loan by the accused person and the cheque was not filled up at the time of issuance of the cheque (whereas the cheque were issued subsequently not on the very day of taking loan) and also the fact that the PW-1 has not stated anything that accused instructed to put the dates on the cheques, the court raising the doubt about such issuance of cheque, has dismissed the case by holding that ingredients of the Section 138 NI Act are not satisfied and the accused has not committed any offence.

15. The very findings of the learned trial court is assailed by way of this appeal raising the grievances that the learned trial court has failed to appreciate the matters on record in proper perspective of law and facts. It has vehemently argued by the learned counsel for the petitioner, Mr. B Nath that the findings of the learned trial court is bad in law in as much as the learned Court failed to take note of the legal provision that the accused person failed to rebut the legal presumption under Section 118(b),138,139 of the NI Act. The accused/respondent without assailing any of the relevant issue of the complainant case at the time of cross-examination has simply denied the questions that was put to him under Section 313 Cr.P.C. without any sort of explanation on his part as to how the disputed cheques came to the hands of the complainant etc.etc. It is submitted that the complainant is a holder of cheque in due course and the names and dates in the cheques were filled by the complainant at the instance of the accused/respondent and it is immaterial whether the cheques were filled by the complainant while there is no denial of issuance of cheque on the part of the accused/respondent. It is not mandatory that the body of the cheque ought to be written by the

signatory to the cheque. A cheque can be filled by anybody if it signed by the account holder.

16. It is contended that the learned trial Court has failed to appreciate scope and ambit of presumption u/s 139 of NI Act and other relevant provision of the Act.

Relevant provision of NI Act is quoted below:

Section 118 Presumptions as to negotiable instruments. —*Until the contrary is proved, the*

following presumptions shall be made:—

(a) of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) as to date —that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance —that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer —that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements —that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps —that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course —that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Section 139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.]

17. I have also heard the submission of learned counsel for the State Ms. A Begum, who is a formal party.

18. In support of its contentions learned counsel has relied upon various decisions of the Hon'ble Supreme Court.

- On the point of presumption u/s 118 and 139 of NI Act following decision has been relied by the appellant:-

1. *Bir Singh Vs. Mukesh Kumar (2019) 106 ACC 923*
2. *Rohitbhai Jivanlal Patel Vs. State of Gujarat and Anr. (2019) 5 SCALE 138*
3. *Kishan Rao Vs. Shankargouda (2018) 8 SCC 165*
4. *Hiten P Dalal Vs. Bratindra Nath Benarjee (2001) 6 SCC 16*
5. *Girishbhai Vs. Natwarbhai Patel State of Gujarat (2006) Crl. Law Journal 3378*

- On the point of appreciation of evidence, the learned counsel for the appellant has relied upon the following decisions:

1. *Ravi Kapoor Vs. State of Rajasthan (2012) 9 SCC 284*
2. *Radhakrishnan Nagesh Vs. State of Andhra Pradesh 2013 11 SCC 688.*

- On the point of benefit of doubt following citations have been relied:---

1. *AIR 1993 Calcutta 337 Traders Syndicate Vs. Union of India*
2. *Susha Singh and Anr. Vs. State of Punjab 2003 Crl. Law Journal 3876.*
3. *Ramakant Rai Vs. Madan Rai and Anrs. 2004 Crl. Law Journal (SC).*

- On the point that entire body of cheque need not be written by the maker or drawer

and only the signature of drawer is material, the appellant has relied on the decision of **1996 Crl. Law Journal 3099 Satish Jayantilal Shah Vs. Pankaj Mashruwala and Anr.**

19. For better appreciation of the matter, let us reproduced the observation made by the Hon'ble Apex Court in Bir Singh (supra)

21. *In passing the impugned judgment and order dated 21-11- 2017, the High Court mis-construed Section 139 of Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.*

22. *In **Hiten P. Dalal vs. Bratindranath Banerjee (2001) 6 SCC 16**, this Court held that both Section 138 and 139 require that the Court shall presume the liability of the drawer of the cheques for the amounts for which the cheques are drawn. Following the judgment of this Court in **State of Madras vs. Vaidyanatha Iyer AIR 1958 SC 61**, this Court held that it was obligatory on the Court to raise this presumption.*

23. *Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the nonexistence of the presumed fact as held in **Hiten P. Dalal (supra)***

36. *The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or*

liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

20. The aforesaid decision covers almost all the issues raised in the present case. The challenge that as the complainant fill up the cheque, and hence it is doubtful, is not at all relevant as the signed cheque was voluntarily given to the complainant towards some payment cannot be a ground to reject the case. The complainant has duly proved all the relevant documents to prove that he is holder of cheque in due course and the respondent/accused person failed to rebut such presumption by adducing any sort of evidence. His mere denial at the end of the trial u/s 313 CrPC without any plausible explanation and without any effective cross-examination to rebut the case of the complainant, the learned trial Court ought not to have acquitted the accused respondent of the charge u/s 138 of NI Act. The learned trial Court erred in law in holding that burden lies upon the complainant to prove the issuance of cheque against liability.

21. On examination of the impugned judgment and findings of the trial Court it can be seen that the trial Court suffered from perversity and fundamental error of approach in facts as well as in law. The observations and considerations do not stand in conformity with the presumption existing in

favour of the complainant by virtue of Section 118 and 139 of NI Act. Law says such a presumption exists against legally enforceable debt. The observation made by the trial Court as regards the variance of the statement of complainant and the witness about the date of issuance of cheque and other particulars of cheque is not relevant in the present case in view of non denial of taking loan as well as issuance of cheque by the accused respondent no effective cross examination was made to prove. On perusal of the order of the Court it is noticed that the trial Court had proceeded to pass the order of acquittal on the mere ground of "creation of doubt". But in view of the special provision made under the NI Act as has been held in the aforesaid decisions, this Court is of considered view that the learned trial Court proceeded on a misplaced presumption. A mere denial or mere creation of doubt is not sufficient unless the accused/respondent successfully rebutted the legal presumption as envisaged by Section 139 of NI Act. Presumptions are devices by use of which the Court are enabled and entitled to pronounce on a issue notwithstanding that there is no evidence or insufficient evidence. In the present case, the trial Court has failed to appreciate raise the presumption u/s 139 in favour of the complainant, while the accused led no any rebuttal evidence.

In *Hiten P Dala* (supra) reference has been made to the decision of *State of Madaras Vs. A Vaidyanthair* AIR 1958 SC 61 wherein it has been held that it is obligatory on the part of the Court to raise the presumption 138 and 139 of NI Act in every case where the factual basis for raising of the presumption has been established. Both the sections 138 and 139 required that Court shall presume the liability of the drawer of the cheque for the amount for which the cheque were drawn. It introduces an exception to the general rule as to the burden of prove in criminal cases and shift the onus to the accused. Such a presumption is a presumption of law as distinguished from a presumption of facts which describes provision by which the Court may presume certain State of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence because by the letter all that it means is that prosecution is obliged to prove the case beyond reasonable doubt. The obligation of prosecution may be discharged with the help of presumption of law or facts unless

the accused adduced evidence showing the reasonable possibility of non existence of presume facts.

22. In Ravi Kapoor (Supra) it has been held that the variations in the statement of witnesses which are neither material nor serious enough to affect the case of prosecution adversely are to be ignored. It has been held that statement of witnesses had to be read as a whole and the Court should not pick up a sentence in isolation in the entire statement ignoring its proper reference, used the same against or in favour of a party. The contradictions have to be material and substantial so as to adversely affect the case of prosecution. The same aspect has been re-iterated in Radhakrishna Nagesh (supra) that reading a line out of context, is not an accepted canon of appreciating evidence. The trial court must examine the cumulative effect of complete evidence on record and case of the prosecution in its entirety.

23. In Sussha Singh (supra) it has been held that benefit of doubt is to be based on reason and common sense and must grow out of evidence in the case. Meticulously hyper sensitive approach not warranted. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubt or lingering suspicion and thereby destroy the social defence.

24. Bearing in mind the above legal principle and the pronouncement above, turning to the present case in hand it will be found that the accused/respondent neither has challenged the factum of taking loan from the complainant, nor has disputed his signature in the cheque and the amount thereof and no rebuttal evidence has been adduced to rebut the legal presumption but has simply denied the case of the complainant only at this stage of giving his statement u/s 313 of CrPC. Only on the error of the statement of PW-2 that the cheque was issued on the day of taking the loan the entire case cannot be discredited. It is to be noted that from the totality of the evidence of PW-2 he has affirmed the taking of loan by the accused/respondent and also about issuance of cheque in his presence but he has erred in stating the date of issuance of cheque, which is inconsequential in absence of denial of the respondent and having no rebuttal evidence on the part of accused/respondent. Only because of this

one omission on the part of PW-2 his entire evidence cannot be discarded whereas his evidence is all thorough consistent on the entire issue. Such an omission in evidence may also take place as he was examined after more than one year of the occurrence and the learned trial Court has entered into an illegality while acquitting the accused. Rather it can be held that complaint/appellant has successfully proved his case that the accused/respondent No. 2 has committed an offence u/s 138 of NI Act. Accordingly impugned order of acquittal is set aside and accused/respondent No. 2 Bhabendra Talukdar is hereby convicted u/s 138 of NI Act.

25. Bearing in mind the object and reasons behind the act that the object of criminalizing the dishonor of cheque was to regulate the commercial activities and to safeguard the interest of creditor and also bearing in mind the principle laid in **AIR (2012) SC 528 R Vijayan Vs. Baby and Ors.** that there is no bar to levy fine twice the cheque amount and can also direct such payment as compensation and also considering the aspects that the accused/respondent is a doctor by profession, instead of sentence of imprisonment, he is hereby sentenced to pay a fine twice the cheque amount within a period of 3 (three) months from today, in default RI for 6 (six) months. The amount of fine be given to the complainant as a compensation. Send down the case record.

JUDGE

Comparing Assistant